IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MYLES STEWART, Trustee of the Estate of ARTHUR PEABODY and OLIVE PEABODY,

Appellants,

vs.

PHOENIX TITLE & TRUST COMPANY,

Appellee.

No. 18819

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLANTS

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INDEX

TABLE OF CITATIONS

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JURISDICTIONAL STATEMENT

This is an appeal from an Order entered on March 29, 1963, by the United States District Court for the District of Arizona affirming the Order of the Referee in Bankruptcy entered May 31, 1962.

This appeal is brought under the jurisdiction established in Section 24 of the Bankruptcy Act, 11 USCA Paragraph 47.

INTRODUCTION

For the sake of clarity, the Phoenix Title & Trust Company, Inc., in its capacity as a creditor of the bankrupt estate will hereinafter be referred to as the "cred-

itor"; the Phoenix Title & Trust Company, Inc., in its capacity as Trustee under the terms of the conveyance by the bankrupts will hereinafter be referred to as the "Trust Company"; all events transpired in Tucson, Pima County, Arizona.

The Transcript of Record will be designated "T.R.", and the Reporter's Transcript will be designated "R.T."

STATEMENT OF THE CASE

This appeal is presented upon the theory that if a party desires any change in a judgment it must appeal. *Fidalgo Island Packing Company v. Phillips,* (9th Cir.) 253 F.2d 621 (1957).

The Trustee-Appellant agrees completely with the result of ruling of the United States District Judge and his reasons therefor. The District Judge did not sustain the portions of the Referee's Order which held that the Appellee's liens were inchoate as against liens of the United States, and that therefore, any rights which the Appellee, the "creditor," might have were voidable under Federal law by the United States and a Trustee in Bankruptcy under Section 70(e) of the Bankruptcy Act. These additional grounds in support of the ruling of the District Judge are the basis of this appeal.

The basic theory of the Referee and the United States District Judge in determining that the rights of Phoenix Title & Trust were void as to subsequent creditors was because the instruments creating a lien were unrecorded or unfiled in accordance with the Arizona statutes.

The appeal is presented to attempt to clarify the rights of creditors and to determine further the issue:

what is an inchoate lien as against liens for Federal taxes, and further, to give additional grounds for support of the ruling of the District Judge.

FACTS OF THIS CASE

That an involuntary Bankruptcy Petition was filed against the bankrupt Peabodys on the 15th day of April, 1959. That the Peabodys were duly adjudicated bankrupt. That the involuntary petition was filed by Ashby Lohse as attorney for William T. Fitchett, Edwin W. Smalley, and Paul E. Greer.

That prior to the filing and adjudication in the involuntary proceeding, the bankrupts and the Trust Company, the Appellee, entered into a transaction described as follows:

> By a recorded Deed, Exhibit 1, Recorder's Transcript, page 136, title to a parcel of real property in Pima County, Arizona, was transferred to the Trust Company, as Trustee. By a separate unrecorded Trust Agreement, Exhibit 1B, the title was held in trust for the Peabodys. The Trustee's Deed was dated July 23, 1956, and acknowledged by the Peabodys on July 26, 1956, was recorded at the request of the Trust Company on July 31, 1956, and duly appears in the records of the County Recorder, Pima County, Arizona. The beneficiaries of the trust are not named in the Trustee's Deed. The Trust Agreement, Exhibit 1B, dated July 23, 1956, was acknowledged by the Peabodys on July 26, 1956, and by officers of the Trust Company on July 31, 1956. Both the Trustees' Deed and the Trust Agreement bear the identification number, "Trust No. 6007."

The Trust Agreement provides that the property to which the Trust Company received title as Trustee (the real property described in the Trustee's Deed, Exhibit 1, which will hereinafter be referred to as the real property), was to be held in trust by the Trustee, the Trust Company, for the beneficiaries, Arthur Peabody and Olive C. Peabody, for the purposes of,

> "subdividing, platting, deeding, selling, conveying, receiving payment for and otherwise handling the property as a whole or in lots and parcels, upon such terms and conditions and for such prices as the Trustee may be instructed in writing so to do by the beneficiaries or their authorized representatives."

Under the provisions of the Trust Agreement, Exhibit 1B, the Trust Company is granted no discretionary powers and is charged with no responsibility in handling and managing the property. The prescribed duties of the Trust Company are ministerial in nature, to be performed under the direction of the beneficiaries. The settlors, Arthur Peabody and Olive C. Peabody, remained in possession and control of the property and were in possession and control of the property at the time of the bankruptcy herein, with all powers of management, charged with full responsibility for handling the property in carrying out the stated purposes of the trust.

The Trustee's Deed and the Trust Agreement contain no provision that the instruments were executed as security for the performance on the part of the Peabodys of any contract between them and the creditor. There is no reference in the Trustee's Deed or in the Trust Agreement to any other instrument executed or to be executed by the Peabodys as security for the performance on the part of the Peabodys of any contract between them and the creditor.

The Deed to the Trust Company as Trustee and the Trust Agreement were executed by the parties with the intention of establishing a passive depository of the legal title to the real property, with the actual and equitable ownership remaining in the Peabodys for their own use and benefit. The Trust Company as Trustee did not take title to the property as security for the performance of any contract or obligation to be performed on the part of the Peabodys.

On July 24, 1956, the Peabodys made their promissory note, Exhibit 1D, in the principal amount of $50,000.00, payable to the "creditor" on or before July 24, 1957, with interest at the rate of six (6%) per cent per annum from July 24, 1956, interest payable at maturity. The note recites that it is secured by a collateral assignment, Exhibit 1C, of Peabodys' beneficial interest in Trust No. 6007.

That the "creditor" drew checks payable as follows:

1. Check No. 108, in the amount of $32,701.45, to Arthur Peabody and Olive C. Peabody; for "proceeds of your loan from Phoenix Title & Trust Co."

2. Check No. 107, in the amount of $375.00, to Associated Engineering Co.; for "balance due for cross-sectioning streets in Littletown."

3. Check No. 106, in the amount of $16,712.31, to Valley National Bank; for "payment in full of mortgages from Ackley, DeBand, Kemmeries."

With their note given to the "creditor" on July 24, 1956, the Peabodys, as assignors, executed an instrument designated as "Collateral Assignment of Ben-

eficial Interest" (hereinafter referred to as the assignment) wherein the "creditor" is named as assignee. The assignment bears undated endorsements signed by officers of the "creditor," whereby the "creditor" approves and accepts the assignment as assignee and accepts the assignment as Trustee. The assignment was acknowledged by the Peabodys on July 26, 1956, but was never recorded.

That the Exhibits 1 (deed), 1B (Trust Agreement), 1C (Collateral Assignment), and 1D (note) do not constitute an assignment passing legal title to the "creditor," nor a present assignment of a beneficial interest in property. Furthermore, Exhibit 1C is not a mortgage.

The Collateral Assignment refers to the promissory note for $50,000.00, given by the Peabodys to the "creditor" on July 24, 1956, and provides that for the purpose of securing payment of said note, the assignor does thereby assign, convey, transfer and set over unto the assignee all of his rights, powers, privileges, proceeds and avails of the beneficiary created or reserved, and all of the interest of the beneficiary in Trust No. 6007, insofar as the real property is concerned. The "assignment" contains release clauses in relation to said property, reading as follows:

> "It is provided that the lots into which the property is subdivided may be released by assignor upon the payment to trustee for the benefit of assignee of the sum of $600.00 per lot, said amount to be applied first to the payment of interest to the first of the month next succeeding the date when such funds are available for distribution to assignee and the balance to be applied on (the) principal.
>
> "It is further provided that in the event that the

assignor herein has set up a sales escrow in the Phoenix Title and Trust Company that trustee will be authorized to convey a lot or lots to said assignor without the payment of any consideration provided assignor is obtaining a construction loan (including any refinancing, reneweal, or increase thereof) from a bona fide lending agency and provided said escrow provides that out of the sales price of said home the escrow agent shall remit the release price and all expenses of sale and conveyance by trustee for such lot or lots to the trustee, it being understood that this amount must be paid not later than the date on or before which the note secured hereby is to be paid in full. The release price herein referred to is the amount of $600.00 per lot as herein set forth."

The "assignment" also provides in the event of default on the part of the Peabodys in the payment of their note or any of the terms of the assignment that

> "the whole amount of the principal sum and any amount advanced by the assignee . . . shall be . . . deemed to have become due and the same . . . shall be collectible in a suit at law or by foreclosure . . . *as if this collateral assignment of Beneficial Interest were a mortgage. . . .*"
> (Emphasis supplied)

The assignment further provides for the appointment of a receiver "to take charge of said Beneficial Interest and said property."

A notice of tax lien against the Peabodys in favor of the United States of America, dated August 27, 1957, for $4,268.21, was filed August 28, 1957, fee No. 52633, in the office of the County Recorder of Pima County, Arizona.

A notice of tax lien against the Peabodys in favor of the United States of America, dated September 19,

1957, for $2,076.67, was filed September 21, 1957, fee No. 57827, in the office of the County Recorder of Pima County, Arizona.

The only documents recorded or filed in the office of the Pima County Recorder, or elsewhere in Arizona, as evidence of the agreement between the bankrupt and Phoenix Title & Trust Company, as Trustee, or Phoenix Title & Trust Company, the "creditor," was the Deed mentioned as Exhibit 1.

On December 12, 1958, the "creditor" brought an action against the Peabodys and others alleging, in substance, that the Peabodys had given the "creditor" their note for $50,000.00 on July 24, 1956, and in anticipation thereof, and as part of the same transaction, in order to secure the payment of said note, the parties made and executed the Trust Agreement wherein the Peabodys were beneficiaries and the Trust Company was Trustee under Trust No. 6007; that with the delivery of said note as part of the same transaction, in order to secure the payment of said note, the Peabodys executed and delivered to the "creditor" the assignment of all their beneficial interest in and to all the assets held by the Trust Company under Trust No. 6007; that the Peabodys had defaulted upon the note and assignment under the Trust securing said note; that the sum of $42,536.24, with interest from October 1, 1957, was then due. The complaint demanded, among other things, the following relief:

> "For judgment against Arthur Peabody and Olive C. Peabody, husband and wife, and Paul E. Green and Evelyn C. Green, in the sum of $42,536.24 together with interest as provided in said note from October 1, 1957, until paid for plaintiff's attorney fees in a sum equal to ten (10) per cent of all sums found due to date of judgment.

"That the respective *collateral assignments* of defendant Arthur Peabody's and Olive C. Peabody's beneficial interest in the assets of the trust hereinabove referred to be declared to be a first and prior lien against their interest in the property involved, and that said assignments be foreclosed as a mortgage, and the premises therein described and all of said defendants' interest under the terms of said trusts be sold under execution according to the law and practice of this Court to satisfy the demand of the plaintiff. That out of the proceeds of said sale, the plaintiff be paid the amount due; that in case of a deficiency arising from said sale, the plaintiff have judgment for the amount thereof; and that at said sale the plaintiff or any other person to this cause may become purchasers of said premises; that all defendants and all persons or corporations claiming to, under or from them and all persons having a lien subsequent to said Assignments be forever barred and foreclosed of and from all equity of redemption and claim of, in or to said assigned premises and every part and parcel thereof from and after the delivery of the Sheriff's Deed." (Emphasis supplied)

The action, designated in the docket of said Superior Court as No. 57402, had not been prosecuted to judgment at the time of bankruptcy herein and the case is still pending.

STATUTES INVOLVED

Arizona Revised Statutes:

Section 1-215, subdivision 22
Section 33-412A
Section 33-702
Section 33-751
Section 33-753, subdivision 5

Internal Revenue Code of 1954:

Section 6323

United States Bankruptcy Act:
Section 70(c)
Section 70(e)

SPECIFICATION OF ERRORS RELIED UPON

The District Court correctly sustained the Referee's ruling based upon certain of the premises expounded by the Appellant and affirmed by the Referee. However, the District Court erred in not concurring with the conclusion of law set forth in paragraphs XI and XIII of the Referee's Findings of Fact and Conclusions of Law. These conclusions found that under Federal law the lien of Phoenix Title & Trust, the "creditor," upon the property rights of the bankrupts was inchoate as against liens of the United States, and that the "transfer" by assignment is a "transfer" as defined by the Bankruptcy Act, which is voidable by the Trustee under Section 70(e) of the Bankruptcy Act.

QUESTIONS PRESENTED

1. Is an unrecorded mortgage of real property or an unfiled mortgage of personal property inchoate as to a subsequently recorded tax lien of the United States of America, that attached prior to the time of the filing of a Bankruptcy Petition?

2. Is an assignment, which is an inchoate lien, whether of an interest in real or personal property, voidable under Federal law and therefore null and void as against the Trustee in Bankruptcy under Section 70(e) of the Bankruptcy Act? (11 U.S.C. 110(e))

ARGUMENT

The Bankruptcy Act, Section 70(e)(1), expressly empowers the Trustee to avoid transfers or obligations

incurred, which obligation or transfer is voidable under state or Federal law by any creditor having a provable claim. *Crenshaw v. McKinley* (CCA 2d 1941) 116 F.2d 877, and *Pirie v. Chicago T & T Company,* 182 U.S. 438 (1901).

The point raised by the Appellant in this opening brief is that the collateral assignment between the "creditor" and the bankrupt is voidable under Section 70(e) of the Bankruptcy Act on the basis: (1) Federal Law, that the mortgage is an inchoate transfer, and that under Federal law, Section 6323 of the Internal Revenue Code of 1954, the United States' lien is prior to the lien of the "creditor," and the "creditor's" instruments were inchoate and unperfected under Section 6323 of the United States Internal Revenue Code, and therefore, the "creditor" is not entitled to the protection given by these statutes to a mortgagor, purchaser, or assignee; (2) State Law, that the transaction between the "creditor" and the bankrupt did not comply with the laws of the State of Arizona for the recording of instruments, and therefore, is not a prior lien to the lien of the Trustee herein.

Federal Law

Where the Trustee invokes Section 70(e) of the Bankruptcy Act, he must then demonstrate that he is asserting the right of a creditor or creditors of the bankrupt, against whom the particular transfer or obligation was fraudulent and voidable. *Hartman v. Lauchli* (CCA 8th 1956) 238 F.2d 881, cert. den. 353 U.S. 965 (1957); in re *Dipierro,* 159 F. Supp. 497 (1958).

Although the Trustee under Section 70(e) asserts the rights of creditors, he does so in his capacity as

Trustee, and is therefore endowed with whatever status the Act confers upon him in that capacity. *Peacock v. Fairbairn,* 45 I. 628, 264 Pac. 231. *Timmer v. Talbot* (D.C. Mich. 1936) 19 F. Supp. 687, aff'd. (CCA 6th) 89 F.2d 1011.

The creditors whose rights the Trustee invokes must be one "having a claim provable under this act." The claim which the Trustee proceeds under is that claim of the United States of America as expressed in its recorded lien and its claim on file herein, of which no contest is made in these proceedings.

The question then presented is whether the transaction between the "creditor" and the bankrupt is such that the transaction can be avoided by the United States as a creditor. The United States filed a tax lien and recorded said lien prior to the recording of any instruments showing title to the bankrupt's property in the "creditor." Therefore, the Trustee, under Section 70(e)(1), can also avoid the lien of the "creditor." (See cases cited above.)

It is the contention of the Trustee that the lien of the "creditor" is inchoate and unperfected, and therefore, the Trustee steps into the shoes of the United States as a creditor and therefore has a prior lien to that of the "creditor." *Ball Construction v. Jacobs,* 78 S. Ct. 442 (1958), reversing 140 F. Supp. 60. "The instrument involved being inchoate and unperfected, the provisions of § 3672(a) . . . (of the Internal Revenue Code) do not apply."

Various tests have been set forth by the courts to determine if a lien is inchoate and these are set forth as follows. Under these tests the alleged lien of the "creditor" is inchoate under all of the tests set forth below.

(a) The identity of the lienors was not fixed (because the lien was secret for lack of recordation). *United States v. Knott,* 298 U.S. 544, 56 S. Ct. 902 (1936).

(b) Neither title nor possession was in the "creditor." *United States v. Gilbert Associates,* 345 U.S. 361 (1953); *United States v. Carroll Construction,* 346 U.S. 802 (1953), reversing 249 P.2d 234.

(c) The "identification" of the property subject to the lien was not specific and consistent, *United States v. Texas,* 314 U.S. 480 (1941), for the reason that parcels could be released and the lien was not recorded; if the "creditor's" claim is made on the collateral assignment for the reason it was not recorded. The court is referred to: *United States v. Scovil,* 348 U.S. 218 (1955), reversing 78 S.E.2d 277; *United States v. Colotta,* 350 U.S. 808 (1955), reversing 79 So.2d 474; *United States v. White Bear Brewing Co.,* 350 U.S. 1010 (1956), reversing 227 F.2d 359; *United States v. Vorreiter,* 355 U.S. 15 (1957), reversing 307 P.2d 475.

One of the chief objectives of a recording statute is to prevent the obtaining of credit for the completion of a transfer of interest in property that is actually covered by a secret lien or conveyance. *General Motors Acceptance Corporation v. Collier,* (CCA 6th) 106 F.2d 584, cert. den. 309 U.S. 682, 60 S. Ct. 723. *Bank of America National Trust and Savings Association v. Sampsell,* (CCA 9th 1940) 114 F.2d 211.

The words of the United States District Judge as to the question of mortgages were brief and set forth the point clearly. He said,

"The collateral assignment constitutes an unre-

corded mortgage of real property, and the recording of the deed from the Peabodys to Phoenix Title & Trust Company, as Trustee, was not notice of such collateral assignment to the creditors of the Peabodys. Accordingly, the collateral assignment is voidable under Section 70(c) of the Bankruptcy Act."

In 1961 the Supreme Court, in the famous case of *Lewis v. Manufacturers National Bank of Detroit*, 364 U.S. 603, the court made the following comment:

> "We think that one consistent theory underlies the several versions of § 70c which we have set forth, *viz.*, that the rights of creditors — whether they are existing or hypothetical — to which the trustee succeeds are to be ascertained as of 'the date of bankruptcy,' not at an anterior point of time. That is to say, the trustee acquires the status of a creditor as of the time when the petition in bankruptcy is filed. We read the statutory words 'the rights .. . of a creditor (existing or hypothetical) then holding a lien' to refer to that date. This construction seems to us to fit the scheme of the Act. *Section 70e enables the trustee to set aside fraudulent transfers which creditors having provable claims could void.* The construction of § 70c which petitioner urges would give the trustee power to set aside transactions which no creditor could void and which injured no creditor. That construction would enrich unsecured creditors at the expense of secured creditors, creating a windfall merely by reason of the happenstance of bankruptcy." (Emphasis supplied)

With the lien of the "creditor" being inchoate, the Trustee under Section 70(e) should prevail, and should have a lien prior to any lien of the "creditor."

State Law

Arizona Revised Statutes §§ 33-412A and 33-702

are set forth in full as they are controlling on the subject of recording instruments which are either mortgages or trusts.

Arizona Revised Statutes § 33-412A:

"Invalidity of unrecorded instruments as to bona fide purchaser or creditor.

A. All bargains, sales and other conveyances whatever of lands, tenaments and hereditaments, whether made for passing an estate of freehold or inheritance or an estate for a term of years and deeds of settlement upon marriage whether of land, money or other personal property, and deeds of trust and mortgages or whatever kind, shall be void as to creditors and subsequent purchasers for valuable consideration without notice, unless they are acknowledged and recorded in the office of the county recorder as required by law, or where record is not required, deposited and filed with the recorder."

Arizona Revised Statutes § 33-702:

"Mortgage defined; pledge distinguished; admissibility of proof that transfer is a mortgage.

"Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is a mortgage, except a transfer of personal property accompanied by an actual change of possession, which is deemed a pledge. The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing that the transfer is a mortgage, be proved except against a subsequent purchaser or encumbrancer for value and without notice, notwithstanding that the fact does not appear by the terms of the instrument."

These sections specifically state that every transfer, other than a trust, is a mortgage. This section states that the deed to the Trust Company is not a

mortgage and cannot be foreclosed as one. Therefore, the rights, if any, claimed by the "creditor" must arise under the *collateral assignment*. This term is used advisedly as discovery of the trust instrument would give no notice of any security device, because by the terms of that instrument, the Peabodys are the beneficiaries and not the "creditor." Quoting from the words of the District Judge relative to the issue of whether trust creates an interest in personal property, the judge said,

> "Even if it were concluded that the trust is active and that the interest of the Peabodys is personal property, it would appear that the collateral assignment constitutes an unfiled mortgage of personal property (other than crops growing or to be grown or animate personal property), void as to subsequent creditors of the Peabodys. Arizona Revised Statutes, §§ 1-215, subdivision 22; 33-751; and 33-753, subdivision 5."

The fact that the transaction, as between the parties might be binding contractually and a valid lien exists *inter se* does not defeat other creditors' liens and those of the Trustee.

> "It is not enough that the purported assignment might have been valid as between the parties. The statute prescribes the form, manner, execution, and delivery of assignments and its contents." *Lawrence v. Delta Metals, Inc.*, (CA 5th 1960) 280 F.2d 86.

A typical reported case, though old, sheds light on the failure to properly record, the failure in this case being failure to record the collateral assignment. *Joseph vs. Winakur*, (CCA 4th Cir. 1929) 30 F.2d 510. This case holds failure to record is a fatal error as to a lien.

CONCLUSION

It is therefore respectfully submitted that under both Federal and state law the Trustee under Section 70(e), in addition to his rights under Section 70(c) of the Bankruptcy Act, is prior in time and right to the "creditor" in this case, and the order of the Referee as to his ruling, under Section 70(e), be sustained and the order of the District Judge be sustained on this additional ground.

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APPENDIX

United States Bankruptcy Act:

Section 70(c).

The Trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

Section 70(e).

(1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.

(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: *Provided, however,* That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall

reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws.

Internal Revenue Code of 1954:

Section 6323. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors.

(a) Invalidity of Lien Without Notice. Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate.

(1) Under State or Territorial Laws. In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) With Clerk of District Court. In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice; or

(3) With Clerk of District Court for District of Columbia. In the office of the clerk of the United States District Court for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) Form of Notice. If the notice filed pursuant to subsection (a) (1) is in such form as would

be valid if filed with the clerk of the United States district court pursuant to subsection (a) (2), such notice shall be valid notwithstanding any law of the State or Territory regarding the form or content of a notice of lien.

(c) Exception in Case of Securities.

(1) Exception. Even though notice of a lien provided in section 6321 has been filed in the manner prescribed in subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) Definition of Security. As used in this subsection, the term "security" means any bond, debenture, note, or certificate or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, temporary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money.

(d) Disclosure of Amount of Outstanding Lien. If a notice of lien has been filed under subsection (a), the Secretary or his delegate is authorized to provide by rules or regulations the extent to which, and the conditions under which, information as to the amount of the outstanding obligation secured by the lien may be disclosed.

Arizona Revised Statutes:

Section 1-215, subdivision 22. Definitions.

22. "Personal property" includes money, goods, chattels, dogs, things in action and evidences of debt.

Section 33-751. Types of personal property which may be mortgaged.

Mortgages may be made upon:

1. All growing crops.

2. All kinds of personal property except on a stock of goods, wares or merchandise daily exposed to sale as set forth in the provisions of § 33-752. As Amended Laws 1956, Ch. 159, § 1.

Section 33-753. Requirements of validity of mortgage.

A mortgage of personal property or crops is void as against creditors of the mortgagor and subsequent purchasers and encumbrances of the property in good faith and for value, unless:

1. The mortgage is acknowledged in like manner as instruments of conveyance of real property.

2. The mortgage, if of animate personal property other than crops growing or to be grown, is filed in the office of the recorder of the county where the mortgagor resides at the time the mortgage is executed, or if the mortgagor is a nonresident of this State, in the office of the recorder of the county where the property mortgaged is located at the time the mortgage is executed.

3. The mortgage, if of crops growing or to be grown, is filed in the office of the recorder of the county where the land is lo-

cated upon which such crops are growing or to be grown.

4. The mortgage, if of personal property other than crops growing or to be grown or animate personal property, is filed in the office of the recorder of each of the counties where the property mortgaged is located and where the mortgagor resides at the time the mortgage is executed, provided that in case the mortgagor is a nonresident of this state, no filing where the mortgagor resides is required, and, if the property mortgaged is thereafter removed to another county of this state, either the mortgage is filed in that county or there is or has been filed a statement of recordation as prescribed in § 33-754.

5. The mortgage is clearly designated on its face, apart from and preceding the terms of the mortgage, to be a mortgage of crops and chattels, or either.

6. Within six years from the last filing or refiling, the mortgage is filed in its entirety, or in lieu thereof there be filed a certification executed by the mortgagor or mortgagee, or the successor in interest of either, and filed in the office of the recorder of each county in which the mortgage has been filed. The certificate shall be in substantially the following form:

Certificate of Refiling

By this certificate of refiling that certain mortgage made by ....., mortgagor, of ....., to ....., mortgagee, of ....., and dated the ..... day of ....., in the year ....., and filed in the office of

the recorder of the county of ....., on the ..... day of ....., in the year ....., and abstracted in book ..... of ....., at page ..... (set forth if available the date and place of each filing), be and the same hereby is refiled.

(Signed) A.B. or C.D.

The certificate shall be acknowledged in like manner as conveyances of real property. No certificate shall be deemed defective because it does not refer to all of the filing data of the original mortgage. The provisions of this subparagraph shall not apply to any mortgage heretofore or hereafter made pursuant to an order, judgment, or decree of court of record, or heretofore or hereafter made to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued under jurisdiction of the Arizona corporation commission. The term "refiling" as used in this section shall include the refiling of a certificate of refiling. As amended Laws 1956, Ch. 159, § 3.

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PHOENIX TITLE & TRUST COMPANY,
Appellee.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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